IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

RESPONSE OF THE STATE OF OKLAHOMA TO
THE CARGILL DEFENDANTS'
MOTION TO COMPEL DISCOVERY [DKT NO. 1941]

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RESPONSE OF THE STATE OF OKLAHOMA TO THE CARGILL DEFENDANTS' MOTION TO COMPEL DISCOVERY [DKT NO. 1941]

The State of Oklahoma respectfully submits this response to the Motion to Compel Discovery filed by the Cargill Defendants on March 30, 2009 [Dkt. No. 1941].

1. Introduction and statement regarding lack of conference of counsel.

The Cargill Defendants' Motion to Compel has two parts. First, it seeks to compel additional discovery over and above that contained in the State's March 19, 2009 responses to discovery. Despite the fact that counsel for the State offered to confer with the Cargill defendants early last week (the week of March 30, 2009), *see* Ex. 1 (email sent after 5:00 p.m. on Friday, March 27, 2009), the Cargill Defendants filed their Motion to Compel, without conference, on Monday morning, March 30, 2009. Fed.R.Civ.P. 37(a)(1) provides that: "[t]he motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." LCvR 37.1 provides that: "this Court shall refuse to hear any [discovery dispute] motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord" (emphasis added). Under L.Cv.R.37.1, the Court should strike or refuse to here this motion pending a good faith conference.

The second aspect of the Cargill Defendants' Motion to Compel is their unwarranted demand that the State separately and formally supplement various discovery responses, the subjects of which have been part of the extensive lay and expert discovery completed since the original discovery responses were made (or earlier responded to). Although counsel have corresponded about these earlier requests, they have not formally met and conferred about them.

As to the March 19, 2009 discovery responses, those responses are adequate. In addition however, on the day the Cargill Defendants moved to compel, in the spirit of collegiality, counsel for the State explained, if such explanation was necessary, what specific types of documents in the grower and applicator files of the Oklahoma Department of Agriculture, Food and Forestry (ODAFF) contain information about the location of the wastes generated by birds owned by the Cargill Defendants. That letter, with its examples of pertinent documents, is Exhibit 2 to this response.

The State will address the complaints of the Cargill Defendants in turn.

2. The State's responses and objections to the Requests for Admission are proper.

Rather than presenting "focused requests for admission," Brief p. 3, the Cargill Defendants served discovery requests which, in some instances, contained factual or errors or vagueness and ambiguity which rendered responses difficult or impossible. Nevertheless, the State responded appropriately. The State responded to each request for admission, objecting to some, and admitting or denying the requests as appropriate.

Rule 36(a)(4) sets out the standard for answers to such requests:

> (4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. . .

Rule 36(a)(4) requires grounds for objection to be stated. The State complied with this rule in its responses to the Cargill Defendants' requests.

Request No. 1 sought an admission that poultry waste is an effective fertilizer when properly used, incorporating in the request the Attorney General's use of certain terms. In response, the State admitted that, when there is an agronomic need for both nitrogen and

phosphorus and waste is used in compliance with law, including the prohibition on runoff, poultry waste was an effective fertilizer. The State pointed out, as is true but inconvenient to the Cargill Defendants, that poultry waste is excluded from the legal definition of fertilizer in Oklahoma. *See* 2 Okla. Stat. § 8-77.2(11) (excluding unmanipulated fertilizers from definition of fertilizer). The State also noted that expert Dr. Gordon Johnson states that poultry waste is not a good fertilizer (because it is not properly balanced to meet different needs for nitrogen and phosphorus, and because use of waste to supply nitrogen results in the over application of phosphorus). Thus, the State appropriately admitted and denied those aspects of the request to give a true response.

Requests Nos. 5 and 6 asked for admission that "[e]very compound" that contains phosphorus either is, or is not, a hazardous substance under CERCLA. The State objected that the status of *all* phosphorus compounds is not the subject of the State's action, making the request both over broad and irrelevant. Contrary to the Cargill Defendants' claim, Brief p. 9, the State has not "put this question directly at issue." In its lawsuit, the State has no reason to claim *every* phosphorus compound is hazardous under CERCLA and has not put in issue the CERCLA status of *every* phosphorus compound. Instead, the State has claimed that the phosphorus compounds in poultry waste is a hazardous substance under CERCLA -- precisely as Chief Judge Egan found in her extensively-reasoned opinion in *City of Tulsa v. Tyson, et al.*, 258 F.Supp. 2d 1263, 1285 (N.D. Okla. 2003) (vacated in connection with settlement). Fed. R. Civ. P. 36(a)(1), or course, limits requests for admissions to the general scope of discovery found in Fed. R. Civ. P. 26(b)(1), which includes relevancy. The status under CERCLA of *all* phosphorus compounds other than those in poultry waste is not at issue in this case and thus is not relevant within the meaning of Fed. R. Evid. 401, in the sense that admission of their status does not make the

existence of any fact of consequence to the determination of the action more probable or less probable. *See EEOC v. TruGreen Ltd. Partnership*, 185 F.R.D. 552, 556 (W.D. Wis. 1998) (applying Fed. R. Evid. 401 to a request for admission). Because the CERCLA status of all other phosphorus compounds is irrelevant, the State has no duty to determine that status and admit or deny it. Similarly, seeking admission of the CERCLA status of *all* phosphorus is facially overbroad.

The State also objected that the status of every phosphorus compound under CERCLA is a pure question of law, and thus not a proper subject for a request for admission. *Tulip Computers Intern., B.V. v. Dell Computer Corp.*, 210 F.R.D. 100, 108 (D. Del. 2002). This objection was valid, and the State asks the Court to sustain it.

Requests Nos. 7-10 sought admission of various things supposedly intended or not intended by the ODAFF in the Animal Waste Management Plans (AWMPs) it "issues" to poultry growers, despite the fact that the Defendants had taken a Rule 30(b)(6) deposition of the ODAFF in which the testimony plainly established that the ODAFF does not "issue" animal waste management plans, but rather hires independent contractors under a federal grant to write such plans to the specifications of the USDA Natural Resource Conservation Service (NRCS). Consequently, the State objected to each of these requests as based on an erroneous factual premise (that the ODAFF "issues" AWMPs) and, as a result, the State could not admit or deny what the ODAFF intended when it issued them. The State incorporated that part of its response to Interrogatory No. 1 which summarized the factual basis for its objection.[1] ODAFF provides a

[1] That evidence, from the deposition of the State's 30(b)(6) designee Teena Gunter, Esq., as well as documents produced from the files of ODAFF, demonstrated ODAFF does not "issue" AWMPs. Contract plan writers, as part of a grant from the USDA, write the AWMPs. AWMPs are not ODAFF products, but are written for the Natural Resources Conservation Service (NRCS) and the producer. AWMPs are written to specifications of the NRCS, using

technical service to NRCS in hiring contractors to write AWMPs, and intends nothing beyond providing the service contracted for: plans written to NRCS specifications by NRCS trained and certified personnel.

The Cargill Defendants implicitly recognize the validity of the State's objection to these requests by offering to rewrite the requests. Brief, p. 10. The Cargill Defendants knew about the contractual relationship between ODAFF and NRCS whereby plans were written by ODAFF contractors to NRCS specifications when they drafted the defective requests. It is no fault of the State that the Cargill Defendants failed to conform their requests to the facts as they knew them to exist. Now that the State has validly objected to the defective requests, the Cargill Defendants cannot be allowed to rewrite them to try to fix the mistake, especially since the fix is both too late and constitutes new requests which exceed the number allowed to the Cargill Defendants.

The Cargill Defendants additionally complain about the objections to Requests Nos. 9 and 10 in which the State objected that ODAFF does not "develop" AWMPs (for reasons stated above about "issuing" such plans) and further objected on grounds of vagueness and ambiguity to the undefined terms "current scientific standards for animal waste management," and "any applicable federal, state, or local regulations or policies." Even as late as their brief supporting their motion to compel, at p. 10, the Cargill Defendants do not specify whose scientific standards they are asking about, or for what aspect of animal waste management the scientific standards are meant to apply, or what federal, state, or local regulations or policies are to be the basis of the

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specific software required by the NRCS, not ODAFF. ODAFF is a technical service provider, and the contractors who write plans are like a field office of the USDA NRCS. Gunter Tr. 81-82. ODAFF has a cooperative agreement with the NRCS whereby the NRCS trains the contractors to write AWMPs on behalf of NRCS. Gunter Tr. 243. Six people have taken the training and been certified by NRCS. Gunter Tr. 244. The plan writers are not full time employees of ODAFF, but are all contractors. Gunter Tr. 244. The plan writers send two copies of the plan to the NRCS, which provides them to the grower, who in turn sends one copy to ODAFF for its files. Gunter Tr. 244. *See* Ex. 3.

State's admission. While a request may ask about the application of law to fact, Rule 36(a)(1)(A), the request needs to be definite enough the answering party can determine what it is about. Requests Nos. 9 and 10 fail that simple test. Calling the State of Oklahoma the "ultimate governing body," Brief p. 10, does not help because, as demonstrated by Ms. Gunter's testimony, AWMPs are written to federal USDA standards, and the ODAFF or the State are not the "ultimate governing body" for what goes in them, or what standards they are to meet.[2]

Requests Nos. 11-13 dealt with "levels of land application of poultry litter" to (undefined) "specific fields" being, or not being, at "reasonable levels," without specifying "reasonable levels" for what purpose. The State objected because the requests did not identify what "levels of land application of poultry litter" they were asking about, because it did not identify any "specific field" (an unspecified "specific field" being a serious contradiction in terms), and because it identified neither what was a "reasonable level," nor for what purpose it is reasonable. In the context of this case, these are not merely abstract objections. Beside not expressing exactly what is being asked about, in this case "reasonable" application could refer to the nitrogen needs of a crop, the phosphorus needs of a field, or the almost inevitable likelihood

[2] In fact, the Cargill Defendants appear to be operating under a fundamental misunderstanding of the role of AWMPs in the State's regulation of poultry waste. Nothing in an animal waste management plan approves of any particular instance of land application of poultry waste. An animal waste management plan is simply *one* of the requirements for operation of poultry feeding operation in Oklahoma and only one of the elements of best management practices. Therefore, compliance with an animal waste management plan does not necessarily equate to full compliance with the requirements of Oklahoma law regarding protecting the environment from contamination from poultry waste (although, of course, failure to comply with an animal waste management plan would equate to a failure to comply with Oklahoma law). *See, e.g.,* Ex. 3 (Gunter Depo., 175-77) ("The animal waste management plan is one piece of the statutory requirements, and there are many, many, many requirements in that animal waste requirement plan"); Ex. 3 (Gunter Depo., 177-78 & 180-81); Ex. 4 (Parrish Depo., 140) ("There are more regulations than just the plan"); Ex. 4 (Parrish Depo., 152-53) ("I can give you a whole list of things they have to -- in addition to [following the waste management plan] that they have to adhere to . . ."). Ex. 4.

that phosphorus, once applied, will illegally run off the field to the waters of the State.[3] The State cannot guess what it is being asked to admit or deny, and the Court should not compel it to do so.

Requests Nos. 14-16 asked the State to admit it had no evidence based on "the specific chemical makeup of poultry waste" (Request No. 14), based on "DNA analysis" (Request No. 15), and based on "biological markers" (Request No. 16) that any poultry waste in the waters of the IRW comes from any particular poultry house. In each instance, the State admitted that it had no evidence based solely on the requested factor (chemical makeup, DNA analysis, or biological markers) that waste in the water came from any particular poultry house. Thus, the State admitted the substance of each request, although it also commented that it need not prove that poultry waste polluting the waters of the IRW comes from any particular poultry house, and that it had evidence based on the requested factors (chemical makeup, DNA analysis, or biological markers) that established waste generated by the Defendants birds, including the Cargill Defendants' birds, is present in the waters of the IRW.

Now the Cargill Defendants complain that they "asked whether the State has any poultry-house-specific evidence from these sources at all." Brief, p. 12. The State does not understand this complaint. It may be the Cargill Defendants want the State to admit something other than what was in the subject requests. However, having admitted the substance of each request, the Court should not compel any further action by the State.

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[3] Applying poultry waste to meet plant nitrogen needs results in the over application of phosphorus because plants need approximately 8 times as much nitrogen as phosphorus and litter has approximately equal amounts of nitrogen and phosphorus. Thus, applying poultry waste for nitrogen needs results in applying too much phosphorus, which has environmental consequences in water bodies, including eutrophication, increased growth of algae and undesirable weeds, and reductions of oxygen in the water. Ex. 5 (OSU Extension Fact Sheet PSS-2249, p. 2).

3. The State's interrogatory responses were proper and its letter of March 30, 2009 specified which documents the Cargill Defendants should examine to ascertain appropriate answers.

A. The State has explained how to determine where wastes come to be located.

This case is about the generation and improper disposal of poultry waste in the IRW, and the harm to the environment caused by that improper disposal. Waste is generated in poultry houses or barns, and comes to be placed on the ground where it is transported by rainfall and infiltration to surface and ground water, causing harm.

A number of the Cargill Defendant's complaints in their motion to compel arise from their desire for specific evidence of their mismanagement of poultry waste, particularly focusing on where and when their wastes are land applied, or where wastes come to be located. In an effort to address the concerns of the Cargill Defendants, the same day the Cargill Defendants filed their motion (without the required good faith conference), counsel for the State wrote them in response to their earlier letter giving them lists and examples of the sorts of documents, already produced, which answered their interrogatories. *See* Ex. 2.

The State provided a description of the pertinent documents in the contract grower and waste applicator files of the ODAFF, long in the possession of the Cargill Defendants, along with examples which showed what its records reflected about the location of waste generated by the Cargill Defendants' birds. As will be shown below, answers to various interrogatories may be found by reviewing records of the State, and the burden of deriving or ascertaining the answer will be substantially the same for either the Cargill Defendants or the State. This is an appropriate response to an interrogatory under Rule 33(d).

Because the Cargill Defendants violated their obligations to confer before filing their Motion to Compel, they short circuited the process contemplated by the Court's earlier order,

Dkt. No. 1063. That order stated that it did not intend to require a form of Rule 33(d) response that was "not helpful to the parties." Dkt. No. 1063, p. 8. The Court further said the parties may "meet and confer and determine an appropriate manner of responding that will be both helpful to the Defendants and reasonable to the Plaintiff." *Id.* In their haste, the Cargill Defendants both violated the Federal and Local Rules requiring a conference of counsel, and the specific Order of the Court to do so. The general principles in the Order are that, when making a Rule 33(d) reference, (1) the responsive documents actually exist, and (2) that the reference to the documents be specific enough for the opposing party to locate the documents. *Id.* at 7-8.

Counsel's letter of March 30, 2009, and its exhibits, intended as a part of a good faith conference to resolve the complaints raised by the Cargill Defendants, explain and show what sort of records reveal to the Cargill Defendants where their wastes come to be located. Wastes start, of course, when dropped by the birds in a poultry house or barn. The Cargill Defendants have never claimed not to know where the barns are. Thereafter, waste is spread on the land. Certain documents in the files of Cargill Defendant growers show where this is done. For example, Exhibit 2 had attached to it (as its own Exhibit 1) a copy of an Animal Waste Management Plan which shows the locations of fields where waste is to be applied. The State told the Cargill Defendants to review the previously produced AWMPs of its growers. Additionally, Exhibit 2 had attached to it (as its own Exhibit 2) a collection of documents from the ODAFF file of Cargill grower Ernest Doyle which showed, to the extent the State itself knows, where waste generated by Cargill birds on Mr. Doyle's farm came to be placed. Some of these documents show where waste is stored, sold, or given away, other documents show where waste was land applied, while others show both the source location and the application site, as well as the date of application. The State directed the Cargill Defendants to search for the

documents for which it had provided examples to answer its interrogatories. Additionally, files in the waste applicator files of the ODAFF also show both the source location and the application site, as well as the date of application. The State directed the Cargill Defendants to these types of records as well. This response is adequate under Rule 33(d) and meets the basic requirements of the Court's earlier order that the responsive documents actually exist and that the reference is specific enough for the Cargill Defendants to locate them. [4]

In its Order of April 4, 2007 (Dkt. No. 1118), the Court reconsidered its earlier Bates stamping requirement because the State's documents, as originally produced, had not been Bates numbered and nothing in Rule 33(d) required Bates numbering. The Court ordered the State to identify responsive documents with clips, dividers or index tabs. This method made sense while the Defendants were still inspecting hard copy documents in the offices of agencies of the State. However, such on site document productions are no longer going on, as the Defendants have already inspected and copied—as is pertinent here—the files of the ODAFF. The State cannot tab documents in the possession of the Defendants or their counsel. The identification of specific *types* of documents originating from the ODAFF files, and now in the possession of the Defendants, serves the Court's requirement that the responsive documents actually exist and are identified specifically enough for the Cargill Defendants to locate them.

B. Responses to individual interrogatories were adequate.

Interrogatory No. 1 asked for the "all facts" known to the State and serving as a basis of any response to a request for an admission which was not an unqualified admission. The State objected that the requirements of disclosing "all" facts or identifying "all" witnesses or

[4] Additionally, former Cargill Breeder Hatchery Operations Manager Charlie Delap testified in deposition about land application locations, improper land application, and lack of environmental oversight. If the Cargill Defendants did not otherwise know about such land application, it has now been made known to them in the discovery process.

documents was overly broad and unduly burdensome. Courts generally find interrogatories overly broad and unduly burdensome on their face to the extent they ask for "every fact" which supports identified allegations or defenses. *See, e.g., Hiskett v. Wal-Mart,* 180 F.R.D. 403, 404 (D. Kan. 1998). The State did provide the principal and material facts supporting its RFA responses, or noted that the bases for its objections to those requests were clearly stated in each response.

The State explained its denials of RFAs 3 and 4 based upon the fact that every land application of poultry waste results in a release or threatened release of hazardous substances from a facility, basing its statements on the statement of facts it used to oppose Defendants motion for summary judgment under CERCLA (Exhibit 1 to the response of March 19, 2009). This alone was an adequate explanation of its denials of the RFAs. The State generically referred to its earlier interrogatory responses, document productions and expert reports and objected that a requirement to reiterate all the facts supporting once again was unduly burdensome and harassing. Interrogatories should not require the answering party to provide a narrative account of its case. *See, e.g., Hiskett,* 109 F.R.D. at 404. The State explained its objections to RFAs 7-10, dealing with the fact that ODAFF does not issue AWMPs with references to the deposition of Ms. Gunter (set out in footnote 1, above), and referred the Cargill Defendants to AWMPs already produced. This was a sufficiently specific reference to tell the Cargill Defendants which documents to review to find information about the AWMPs themselves.

Interrogatory No. 2 sought information about he locations of “facilities” or portions of “facilities” for which any Cargill entity was an “owner,” “operator,” or “arranger” from which a

"release" or "threatened release" occurred.[5] These terms refer to CERCLA. Part of the definition of a "facility" under CERCLA is area where a hazardous substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). The sorts of documents shown by example attached to the letter of March 30, 2009, Exhibit 2, show where Cargill wastes are deposited, stored, placed or otherwise come to be located. More generally, Exhibit 2 also notes that the State's expert reports indicate that most wastes are placed near the place where they are generated, and because they run off, they will come to be located down gradient from application sites and in the waters of the IRW.

The State referred the Cargill Defendants to the factual statement it submitted in response to the Defendants' partial summary judgment motion on CERLCA and its earlier supplemental discovery response of October 19, 2007 with exhibits thereto. The State also referred the Cargill Defendants to their own files which show where their barns in Oklahoma and Arkansas are located and reports of State investigators who observed waste being applied, and the State's expert reports which also state, in general terms, where waste comes to be located.

Interrogatory No. 3 sought identification by date and location of each instance in which a Cargill entity or their Oklahoma contract growers applied poultry litter in violation of Oklahoma statute or inconsistently with the terms of an AWMP issued by ODAFF. The State objected as overly broad and unduly burdensome because the interrogatory sought "each" (a synonym for "all") instance of improper application, *see Hiskett*, 180 F.R.D. at 404, and because ODAFF does not "issue" AWMPs. The State noted that, by way of example and without limitation, 27A Okla. Stat. 2-6-105(A) provides that "[i]t shall be unlawful for any person to cause pollution of any

[5] The State does not accept the premise of the Cargill Defendants that it must prove the exact locations where their wastes come to be located, but that issue is pending before the Court in another motion.

waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." The sorts of documents attached to Exhibit 2 are government reports that demonstrate the dates and locations of land application of Cargill generated waste. The State also referred the Defendants to the Expert Reports of Drs. Fisher, Olsen, Engel, Harwood, and Teaf which, collectively, demonstrate that land applied wastes pollute the waters of the IRW. Additionally, other governmental reports are in full accord with this fact. *See, e.g.*, 2008 303(d) list. The State also referred the Cargill Defendants to Response to Interrogatory No. 2 and State's Supplemental Responses to Defendant Cargill, Inc.'s Interrogatories dated October 19, 2007, with exhibits thereto, attached as Exhibit 2 to its response. This information is sufficient to show the Cargill Defendants where in Oklahoma, to the extent the State knows, their wastes have been applied in violation of law.

Interrogatory No. 4 similarly asked by date, location, and actor about unlawful acts or omissions by any Cargill entity, or their contract growers, in connection with the land application of poultry litter. The State referred the Cargill Defendants to its responses to Interrogatory Nos. 2 and 3, which included reference to the ODAFF documents, examples of which were attached to the letter of March 30, 2009, Exhibit 2. The State additionally referred the Cargill Defendants to its earlier Supplemental Responses dated October 19, 2007 (Exhibit 2 to the response of March 19, 2009). These responses and materials more than adequately inform the Cargill Defendants the specifics of the unlawful acts and omissions regarding the mismanagement of their wastes.

4. The State adequately responded to the Requests for Production of Documents.

Request No. 1 sought "[a]ll" documents in the State's possession relating to any investigation by a government body "into any professional nonfeasance or malfeasance by any

director, shareholder, or employee of BMP's, Inc. and Eucha-Spavinaw BMP's, Inc." The State objected to this request because it is not reasonably calculated to lead to admissible evidence, and because the term "professional nonfeasance or malfeasance" is vague and ambiguous, and because it does not identify any director, shareholder, or employee of BMP's Inc. and Eucha-Spavinaw BMP's, Inc. to which it applies. Additionally, the State objected to the request for "all" documents because it is overly broad and unduly burdensome. Once again, this request does not meet the relevancy requirements of Rule 26(b)(1) and Fed. R. Evid. 401 because the facts of any government investigation of the directors, shareholders, or employees of these two entities do not make any fact of consequence to the determination of this action more or less probable. In essence, this request fails the "so what?" test. As the Tenth Circuit has noted, the Supreme Court has underscored that "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery [to protect] 'a party or person from annoyance, embarrassment, [or] oppression. . . .'" *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648-49 (10th Cir. 2008). Additionally, the request for "all" documents is overly broad. *Regan-Touhy,* 526 F.3d at 649.

Request No. 4 sought "all" documents relating to any violation or alleged violation of any section or subsection of "the federal hazardous waste subtitle, 42 U.S.C. § 6921 et seq., or of any regulations promulgated thereunder," by any Cargill entity. The State objected to this request as overly broad and unduly burdensome and not calculated to lead to admissible evidence, especially since it is not limited to the allegations of the present action, or to violations in the IRW, and requests "all" documents. The request for "all" documents is overly broad. *Regan-Touhy,* 526 F.3d at 649. The offer of the Cargill Defendants to narrow this request to documents about violations in the IRW does not render this request reasonable. In their Brief, p. 18, the

Cargill Defendants refer to Count 3 of the Second Amended Complaint as justifying this request. Count 3 is the RCRA count and was the basis for the State's motion for preliminary injunction. It would be unduly burdensome on its face to require the production of "all" documents referring to the State's RCRA claim, which was the subject of separate discovery, a lengthy hearing, and now, an appeal. Moreover, by referring to a large body of statutory and regulatory law, this Request is vague and ambiguous, rendering it impossible for the State to determine what is asked for.

Request No. 5 sought "[a]ll" documents reflecting or relating in any way to the issuance of any AWMP to any poultry grower in the IRW from the commencement of this suit to the present, including any list or compilation of such permits or the farmers to whom they were issued. The request for "all" documents is overly broad. *Regan-Touhy*, 526 F.3d at 649. The State has already produced the AWMPs in its possession at ODAFF in the files of growers for the Cargill Defendants, and Defendants have long had these documents. An example of an AWMP was attached to Exhibit __ as illustrating how to determine where waste was applied. This particular copy of an AWMP has previously been admitted by Defendants as an exhibit in at least two depositions in this case. *See* exhibit stickers attached to copy. The State objected to this request because it is overly broad, unduly burdensome, harassing, and cumulative of discovery already conducted in this case. The Cargill Defendants do not deny that they have access to AWMPs already produced, but contend that the State must once again produce or identify the AWMPs in its possession. Brief, p. 19. This is an instance in which the Court must limit the discovery as unreasonably cumulative or duplicative. Rule 26(b)(2)(C)(i).

Request No. 6 sought "[a]ll" documents reflecting or relating or in any way to any claim that land application of poultry litter occurred at farms owned or operated by contract growers of

Cargill or CTP. The State objected because seeking "all" documents "reflecting or relating" in any way to the issuance of any AWMP, is overly broad, unduly burdensome and harassing. *Regan-Touhy*, 526 F.3d at 649. Moreover, the State objected to the extent this request implies that the State issues AWMPs, because it does not issue AWMPs or "permits" for reasons set out in Response to Interrogatory No. 1.

However, the State had already responded to a similar request for information about poultry waste disposal by its growers. A copy of that earlier response was Exhibit 2 to the State's March 19, 2009 responses. Moreover, the sorts of documents described in counsel's letter of March 30, 2009, and attached thereto, show the Cargill Defendants where waste generated by their growers is land applied. The Cargill Defendants have long had these documents, and it is only by feigned ignorance that they pretend not to know what a reference to the ODAFF files of their own growers, and of applicators of wastes, means in terms of finding locations where waste is applied. It is overly broad and burdensome to produce once again documents long held by the Cargill Defendants. This is another instance in which the Court must limit the discovery as unreasonably cumulative or duplicative. Rule 26(b)(2)(C)(i).

Request No. 8 sought "[a]ll" documents reflecting or relating to any communication from the State to any Defendant relating to "any" violation of "any" federal state, or local statute or regulation committed or allegedly committed by any grower who has or has had a contract with a Defendant. Such documents are kept by ODAFF in the files of the growers who register with it. Those files have long ago been produced to the Defendants. The Cargill Defendants do not dispute that they have received the files of their growers which contain the requested documents, but want the State to state with particularity what documents were sent to them in the first instance, with copies placed in files they have since inspected. This is another instance in which

the Court must limit the discovery as unreasonably cumulative or duplicative. Rule 26(b)(2)(C)(i). Moreover, the request for "all" documents is overly broad. *Regan-Touhy,* 526 F.3d at 649**.** In addition, the State referred to its RCRA letter and the Complaints filed herein as communications from the State regarding violations of law.

Request No. 9 sought "[a]ll" documents reflecting, or relating to any efforts by the State before December 19, 1997, to prohibit or regulate the land application of poultry litter, or any consideration of such efforts. The State referred the Cargill Defendants to statutes such as 27A Okla. Stat. § 2-6-105 and to documents regarding Governor Keating's Animal Waste Task Force which were produced at the Oklahoma Secretary of the Environment's office and at the Oklahoma Scenic Rivers Commission. The Cargill Defendants do not claim in their motion that they have been unable to locate these documents which were previously produced. Presumably they simply want the State to provide an index of documents they already have and do not claim to be unable to find. This is pointless and oppressive make work.

Additionally, the State objected to the burdensomeness of producing "all" documents relating to "any" efforts to regulate "in any way" the application of poultry waste. The request for "all" documents is overly broad. *Regan-Touhy,* 526 F.3d at 649. The State also objected that documents relating to the State's activities to consider any prohibition or regulation of poultry waste before December 19, 1997 are irrelevant and not calculated to lead to admissible evidence because neither any statute of limitations nor laches applies to the State for the time period before December, 1997. In exercising its power to enforce its laws and protect the environment the State is acting in a sovereign capacity. *Oklahoma City Mun. Imp. Authority v. HTB, Inc.* 769 P.2d 131, 134 (Okla. 1998) (Statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that

every reasonable presumption favor government immunity from such limitation.); *Commissioners of the Land Office v. Pitts,* 173 P.2d 923 Syl. 2 (Okla. 1946)(laches and estoppel do not operate against the state in its sovereign capacity.) Consequently, the actions of the State before 1997 are of no consequence to this action.

5. In light of the rest of discovery, and matters provided in writing, the State need not provide additional formal supplementation of discovery.

A. The State need not formally supplement earlier responses when significant material is made known in the discovery process or in writing.

The arguments of the Cargill Defendants about supplemental discovery fail based on the very rule they invoke. Rule 26(e)(1)(A) states:

> A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:
> (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the *additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*;

(emphasis added). As Wright & Miller state interpreting the language of the Rule:

> As to material omissions, further disclosures are only necessary when the omitted or after-acquired information "has not otherwise been made known to the other parties during the discovery process or in writing." This is not an invitation to hold back material items and disclose them at the last moment. It does, however, recognize that *there is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery.*

Federal Practice and Procedure, § 2049.1 (emphasis added). The complaints of the Cargill Defendants are matters of form, not substance, in light of the extensive discovery done in this case.

The Cargill Defendants acknowledge they sought supplementation "[a]fter considerable additional discovery has taken place." Brief, p. 5. Since the State originally answered discovery requests from the Cargill Defendants the State's experts have filed their reports and most have

been deposed, with the depositions of (most of) the rest scheduled. In consequence, the Cargill Defendants now have a nearly complete picture of the State's case from the enormous amount of discovery which has been conducted. Because the Cargill Defendants now have, or soon will have, the benefit of the State's entire expert case *during the discovery process or in writing*, and the State need not make a separate formal written response to various interrogatories re-presenting information gleaned from the discovery process. Similarly, to the extent the discovery process has yielded additional information pertinent to various discovery requests, that information is now in the hands of the Cargill Defendants and the State is not obligated to formally supplement its responses as suggested. Brief, p. 21, 24.

B. Particular claims of required supplementation are unjustified.

The Cargill Defendants mischaracterize earlier supplementation of discovery. Brief, p. 21-22. In October, 2007, the State supplemented responses to CTP Interrogatories 9 and 13 to show evidence of violations of law for which the Cargill Defendants were responsible. Dkt. Nos. 1933-12 and 1933-13, the responses of March 19, 2009 and particularly their Exhibit 2. That supplemental discovery explained in narrative form the basis for claiming legal violations, gave a list of Cargill Defendant growers and the Bates numbers of their ODAFF files, and took one of those files, as an example, and demonstrated various violations of law from the ODAFF grower records. As the Cargill Defendants well know, even at the level of the ODAFF files the State is not relying on a single grower's files, but has pointed to the other files from which the Cargill Defendants can find additional similar violations. However, the State also has an expert case which shows circumstantially but compellingly that land application of poultry waste from the poultry integrator Defendants' birds, including from the birds of the Cargill Defendants, has caused harm in the IRW. For example, the expert report of Dr. Engel indicated that during the

period 2001 to 2006 Cargill generated no less than 33,984 tons of waste (2006) and as much as 52,257 tons of waste (2004) per year in the IRW. Engel report p. 15. *See* Ex 6. This resulted in the production of between 1.1 million and 1.7 million pounds of phosphorus generated in the IRW each year between 2001 and 2006. *See* Ex 6. In their present motion, the Cargill Defendants act as if they have not read the State's expert reports and attended the depositions of the State's experts, or, for that matter, depositions of their own employees. Moreover, the Cargill Defendants have participated in the depositions of the State itself, various state employees and other fact witnesses. All of the evidence disclosed during this discovery process is available to the Cargill Defendants, and the State need not make any further formal written summary of it by way of "supplementation."

The Cargill Defendants seek supplementation of CTP Interrogatories 11 and 12. Brief, p. 21. The original responses to those interrogatories said the State did not allege that either Cargill entity had violated the provision of the Oklahoma Administrative Code which was the subject of the interrogatories, OAC 35:17-3-14. The State still does not allege a violation of this provision by either Cargill entity. No supplementation of that response is called for.

CTP Interrogatory No. 13 dealt with the basis for claiming the Cargill entities had avoided the costs of properly managing and disposing of their poultry waste. The State originally answered that the Cargill Defendants have avoided the cost of transporting excess litter to locations where it can safely be applied and would not contribute discharge or runoff of pollutants into the Oklahoma portion of the IRW, as well as the cost of proper handling and storage of poultry waste in the IRW. The Cargill Defendants, in essence, claim not to know where their waste goes. The Cargill Defendants have already received documents showing that their waste is land applied. Dr. Engel's report establishes that Cargill operations generate large

amounts of waste every year in the IRW. The State's expert reports and depositions demonstrate that a huge volume of waste is land applied annually in the IRW, including waste generated by the Cargill Defendants. Cargill employee Tim Alsup testified that no one at Cargill was responsible for ensuring that contract growers are complying with the law; contract growers are themselves responsible for detecting whether or not they are violating the law or Cargill policies. Alsup Tr. 130-31. Obviously, the Cargill Defendants are not spending their own resources to ensure proper disposal of the waste created by their own birds. What was learned in the depositions of both the Cargill entities and their employees, the State's experts and their reports, more than adequately supplement this response.

CTP Interrogatory No. 14 dealt with grower contracts being contracts of adhesion. The expert report of Robert Taylor, including but not limited to page 5, paragraph 15 and footnote 3, established that there is no arms length negotiation between the poultry companies and their growers, which he interprets as contracts of adhesion. By this he means an imbalance of economic power requiring growers simply to accept or reject the contract written by the Defendants without the ability to negotiate terms. Appendix B of the Taylor expert report lists the contracts of Defendants that he reviewed, including contracts from the Cargill Defendants. Defendants have had the opportunity to depose Taylor.

Taylor also testified during the Preliminary Injunction hearing, transcripts of which have been prepared. He testified that Defendants exercise control over all essential aspects of poultry production: they own the birds, they own the feed the birds eat, they control when the birds are delivered, the control the number of birds delivered, they control when the next flock of birds is delivered, they control the specifications of the houses and equipment in the houses, the growers must follow the recommendations made by Defendants, and they control where the growing

operations are located. (Taylor P.I. Test., pp. 929-35, 940-44). Taylor also testified that the structure of the contracts with the growers -- generally flock to flock -- underscore the control Defendants have over the growers, as Defendants can simply not deliver new birds. (Taylor P.I. Test., pp. 933-35). Moreover, Defendants' contracts with the growers are generally non-negotiable. (Taylor P.I. Test., p. 940). In short, Defendants have oligopsony power over the growers. (Taylor P.I. Test., p. 941-43). Finally, Defendants' contracts with the growers do not transfer ownership of the poultry waste to the growers. (Taylor P.I. Test., p. 938). These sources, along with other material from discovery herein, including the depositions of the Cargill Defendants and their employees, establish the nature of the contracts with their growers as contracts of adhesion.

CTP Interrogatory No. 15 dealt with the knowledge of the Cargill Defendants that the application of poultry waste in the IRW exceeds the capacity of soils and vegetation to absorb nutrients present in poultry waste. The State originally responded, in part, by pointing out admissions made by and on behalf of the Cargill Defendants in the *City of Tulsa* case that they were aware in the 1990s that phosphorus presented potential problems, and that Cargill admitted that it became aware of the environmental impact of phosphorus in "approximately the mid-1990s." The deposition of Cargill employee Tim Alsup showed that Cargill had a map showing elevated soil test phosphorus (STP) and developed a program called "Precision Ag" to transport wastes from the watershed. Alsup testified that Cargill's breeder farms have fields with STPs as high as 797 and 972 (the recognized agronomic limit in Arkansas is 100). Alsup Tr. 263-65. The very discovery conducted in this case supplements the interrogatory, and the Cargill Defendants improperly want the State to gather and organize the mass of discovery when the rules do not require such.

CTP Interrogatory No. 16 dealt the practice of the Cargill Defendants arranging for their growers to place waste on the land with knowledge that such application would lead to runoff and release of phosphorus and other pollutants and contaminants. In his deposition, Cargill employee Tim Alsup testified that both he and Cargill share the belief that if litter is mishandled there is a risk that water quality issues could arise. Alsup further testified phosphorus can contaminate water when there is runoff after the litter is spread on the fields. Additionally, Alsup testified that Cargill understands that soils could be eroded and that if nutrients are not applied correctly, that there is an increased risk that phosphorus, or nutrients in general, could enter waterways. As indicated elsewhere herein, discovery has supplemented with evidence of land application and the Defendants' knowledge of it and of its consequences.

CTP Interrogatory No. 17 asked for facts supporting the State's unjust enrichment claim, and has been supplemented by the same discovery set forth above for CTP Interrogatory No. 13.

CTP Interrogatory No. 18 asked about the basis for the request for punitive damages against the Defendants. In one aspect or another, this interrogatory has been supplemented by all of the expert reports and depositions, and with the forthcoming deposition of the State's witness on Defendants' financial status.

Defendants comments about "enterprise or any other sort of aggregate liability," Brief, p. 24 is irrelevant. The State has alleged and will prove that the Cargill Defendants, as well as the other Defendants, have all polluted the waters of the IRW, creating an indivisible injury, and therefore are jointly and severally liable for the harm caused. The State will present, as it is entitled to do, a circumstantial case showing production of massive quantities of waste in the watershed, including by the Cargill Defendants, transport of that waste to the waters of the IRW, and resulting injury. The State is also entitled to employ provisions of both federal and state law

to hold the defendants liable jointly and severally for they harm caused to the IRW. The State need not possess the omniscience required to be able to pinpoint the location where every truck load of Cargill Defendants' waste is placed on the land, no matter how much the Cargill Defendants would like to impose that burden on the State.

CONCLUSION

For the foregoing reasons, the State respectfully asks the Court to deny the Cargill Defendants' Motion to Compel Discovery (Dkt. No. 1941).

Respectfully Submitted,

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